89-1555

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARK E. DENNIS,
Petitioner,

v.

MARGARET L. HIGGINS, DIRECTOR,
NEBRASKA DEPARTMENT OF MOTOR VEHICLES, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

RICHARD A. ALLEN
(Counsel of Record)
ZUCKERT, SCOUTT & RASENBERGER
888 Seventeenth Street, N.W.
Suite 600
Washington, D.C. 20006
(202) 298-8660

RICHARD L. SPANGLER, JR.
WOODS & AITKEN
1500 American Charter Center
206 South 13th Street
Lincoln, Nebraska 68508
(402) 474-0321

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

60

QUESTION PRESENTED

Whether a claim that a state tax discriminates against interstate commerce in violation of the Commerce Clause and that seeks an injunction against enforcement of the tax is cognizable under 42 U.S.C. § 1983.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. ——

MARK E. DENNIS,

Petitioner,

v.

MARGARET L. HIGGINS, DIRECTOR, NEBRASKA DEPARTMENT OF MOTOR VEHICLES, *et al.*,

Respondents. [1]

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

OPINIONS BELOW

The opinion of the Supreme Court of Nebraska (App. A, *infra*) is not yet reported. The opinion of the district court of Lancaster County (App. B, *infra*) is not reported. The judgment of the district court of Lancaster County denying petitioner's motions for class certification and preliminary injunction is set forth in App. C, *infra*.

---

[1] Petitioner is Mark E. Dennis. Respondents are the following officials of the State of Nebraska: Margaret L. Higgins, Director, Nebraska Department of Motor Vehicles, Gerald C. Strobel, Director, Nebraska Department of Roads, and Frank Marsh, Nebraska State Treasurer. Respondents are successors in office to other officials whom petitioner sued in their official capacities for injunctive relief.

JURISDICTION

The judgment of the Supreme Court of Nebraska (App. A, *infra*, 1a-27a) was entered on February 16, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides:

> The Congress shall have Power . . .
>
> . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Pertinent provisions of Nebraska's retaliatory tax statute, Nebraska Rev. Stat. § 60-305 (Reissue 1984), are set forth in App. D, *infra*.

STATEMENT

In this case, petitioner filed a class action suit in a Nebraska state court on December 17, 1984 challenging the constitutionality of certain "retaliatory taxes" that the State of Nebraska imposed on motor carriers, including petitioner, who operated trucks in Nebraska that were registered in certain other states. The Supreme Court

of Nebraska affirmed a trial court decision declaring that Nebraska's retaliatory taxes violated the Commerce Clause of the United States Constitution, but it held that this violation did not deprive petitioner of personal consitutional "rights" and therefore did not entitle petitioner to relief under 42 U.S.C. § 1983 or to litigation costs and attorneys' fees under 42 U.S.C. § 1988.

A. Nebraska's Retaliatory Taxes

Nebraska, like most other states, imposes a variety of fees and taxes on motor carriers operating in the state, such as fees for the registration of vehicles and taxes for the use of fuel in the state. In addition, until it was recently amended, Neb. Rev. Stat. § 60-305 (Reissue 1984) authorized respondents, various state officials, to levy additional taxes, commonly known as "retaliatory taxes," which were imposed only on carriers operating vehicles in Nebraska that were registered in certain other states and were not imposed on Nebraska-registered vehicles (App. D, *infra*). The purpose of § 60-305 was to retaliate against states imposing so-called "third structure taxes,"[2] which certain states have imposed on all motor carriers operating in those states, including Nebraska-registered carriers, and to which Nebraska objected. Section 60-305 carried out this purpose by authorizing

---

[2] A "third structure tax" is one that is imposed on motor carriers in addition to the more traditional charges states have levied on such carriers, which are registration fees and fuel taxes (so-called "first" and "second structure" taxes). Examples of third structure taxes include ton-mile taxes, which are based on the weight of trucks and the mileage operated in the taxing state, and axle taxes, which impose a flat charge based on the number of axles on each vehicle. In *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), this Court invalidated one such third structure tax, Pennsylvania's axle tax. The Court noted that flat taxes like Pennsylvania's had prompted Nebraska and six other states to enact retaliatory taxes, and it stated: "Such taxes can obviously divide and disrupt the market for interstate transportation services." *Id.* at 285 (footnotes omitted).

respondents to impose taxes on carriers registered in those states that operate in Nebraska which taxes are equal in amount to the third structure tax imposed by the carriers' state of registration. By thus penalizing carriers from third structure tax states, Nebraska's legislature hoped to pressure the legislatures of those states to repeal their third structure taxes or exempt Nebraska-based carriers from them.

Respondents implemented § 60-305 by imposing retaliatory taxes on carriers whose vehicles were registered in nine states: Arizona, Arkansas, Idaho, Nevada, New York, Ohio, Oregon, Pennsylvania and Wyoming (App. 22a).

B. Proceedings Below

Petitioner Mark E. Dennis, doing business as Dennis Trucking, is a motor carrier residing in Royalton, Ohio, who began operating in 1978 with one truck. Petitioner and his wife now own and operate four tractors and six trailers in several states, including Nebraska. His tractors are registered in Ohio, which imposes a two cents per mile third structure tax. Petitioner was therefore subject to and paid Nebraska's retaliatory tax (App. 29a).

Petitioner filed a complaint in a Nebraska state court on December 17, 1984 as a class action seeking injunctive and declaratory relief and refunds.[3] The complaint al-

[3] Petitioner was joined as a plaintiff in his original complaint by the Private Truck Council of America, Inc. ("PTCA") (now the National Private Truck Council, Inc.), a trade association of private motor carriers, many of whose members were subject to Nebraska's retaliatory tax. The trial court, however, dismissed PTCA as a plaintiff on the ground that it lacked standing because it was not itself subject to the tax (App. 33a).

PTCA and other motor carriers that were subject to retaliatory taxes had filed suits in December 1984 and January 1985 against Nebraska and the six other states that had enacted retaliatory motor carrier taxes, Maine, New Hampshire, New Jersey,

leged that Neb. Rev. Stat. § 60-305 (Reissue 1984) discriminated on its face against interstate commerce and out-of-state residents in violation of the Commerce Clause and the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution. It also alleged that the respondents were therefore liable to petitioner under 42 U.S.C. § 1983. Upon filing his complaint, petitioner moved for a preliminary injunction or, alternatively, for an order requiring the tax collections to be held in escrow pending the outcome of the suit.[4]

The trial court denied petitioner's motion for a preliminary injunction or an escrow order and his motion for class certification (App. 35a). After a hearing on stipulated facts, the trial court, on September 30, 1987, issued a decision declaring the challenged taxes unconstitutional as an unlawful burden on interstate commerce in violation of the Commerce Clause. The court concluded: "On their face said taxes and fees discriminate against interstate commerce." (*Id.* at 29a). Accordingly, it permanently enjoined respondents from assessing, levying or collecting the taxes (*id.* at 30a). The

Georgia, Florida, and Oklahoma. Each of those actions, except the one in Oklahoma, has resulted in final state court decisions invalidating the taxes. *Private Truck Council of America, Inc. v. Sec'y of State*, 503 A.2d 214 (Me.), *cert. denied*, 476 U.S. 1129 (1986); *Private Truck Council of America, Inc. v. New Hampshire*, 128 N.H. 466, 517 A.2d 1150 (1986); *Private Truck Council of America, Inc. v. New Jersey*, 221 N.J. Super. 89, 534 A.2d 13 (N.J. Super. Ct. App. Div. 1987), *aff'd*, 111 N.J. 214, 544 A.2d 33 (1988); *Georgia v. Private Truck Council of America, Inc.*, 258 Ga. 531, 371 S.E.2d 378 (1988); *Private Truck Council of America, Inc. v. Florida Department of Revenue*, 531 So.2d 367 (Fla. Dist. Ct. App. 1988). A trial court decision upholding Oklahoma's tax in 1987 is pending on appeal before the Oklahoma Supreme Court. *Private Truck Council of America, Inc. v. Oklahoma Tax Commission*, No. CJ-84-9902 (Dist. Ct., Oklahoma Co., O.K. February 6, 1987), *appeal filed*, No. 68,401 (O.K. March 9, 1987).

[4] Escrow orders have often been issued in suits of this kind. Justice Blackmun issued such an order in *American Trucking Associations, Inc. v. Gray*, 483 U.S. 1306, 1310 (1987).

court, however, denied without explanation petitioner's claim under 42 U.S.C. § 1983 (*id.* at 30a).

With respect to the entitlement of petitioner and other taxpayers to refunds, the court held that all taxpayers would have to file claims for refunds with the Nebraska Department of Administrative Services (App. 30a). The court also held that petitioner and his attorneys would be entitled to payment of their costs and attorneys' fees under the equitable "common fund" doctrine, but it denied without comment their request for determination that the pertinent common fund would be all the taxes that would be subject to refund as a result of the court's judgment (App. 30a). Since petitioner had paid less than $100 in taxes[5] and since his motion to proceed as a class action had been denied, the court effectively held that there was no common fund from which litigation expenses and attorneys' fees could be recovered.

Petitioner appealed the denial of his claim under 42 U.S.C. § 1983 and the denial of his claim regarding the composition of the common fund. Respondents did not cross-appeal the trial court's invalidation of the tax but did cross-appeal its ruling—albeit a meaningless one—that there was any common fund entitlement to fees and expenses.

On February 16, 1990, the Nebraska Supreme Court affirmed the trial court's denial of petitioner's claim under 42 U.S.C. § 1983, but reversed its holding that petitioner and his attorneys had even a theoretical right to recover fees and expenses under the common fund doctrine (App. 27a). On the latter point, the court held that there was no such right because there was no fund, inasmuch as class certification had been denied and refunds to taxpayers would depend on the filing of individual refund claims and on case-by-case determinations of their merits (*id.* at 26a).

[5] The parties stipulated that petitioner paid a total of $52.60 in retaliatory taxes to Nebraska in 1983 and 1984, the only years covered by the stipulation.

With respect to petitioner's claim under 42 U.S.C. § 1983 the court held:

> Despite the broad language of § 1983 and the fact that there appears to be a division of authority on the question as to whether there is a cause of action under § 1983 for violations of the commerce clause, we believe the better reasoned cases hold that there is no cause of action under § 1983 for violations of the commerce clause.

(App. 5a). The court relied primarily on *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1144 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984), which held that "the Commerce Clause does not establish individual rights against government, but instead allocates power between the state and federal governments."

REASONS FOR GRANTING THE PETITION

The decision of the Supreme Court of Nebraska presents a question of far-reaching importance: whether or not state violations of the Commerce Clause deprive persons affected by such violations of "rights, privileges or immunities secured by the Constitution," and therefore give rise to liability under 42 U.S.C. § 1983. That is a recurring question as to which the federal courts of appeals and many state courts are sharply divided, and it warrants this Court's review. The Nebraska Supreme Court's conclusion that the Commerce Clause does not secure personal rights conflicts not only with other federal circuit and district court decisions applying 42 U.S.C. § 1983 to Commerce Clause violations but also with decisions of this Court expressly holding that the Commerce Clause does secure personal rights. Indeed, some of this Court's landmark civil rights decisions were based squarely on the Commerce Clause and the rights of persons under that Clause to travel among the states free

of state segregation laws that the Court found to be an undue burden on such interstate travel. *E.g., Bailey v. Patterson*, 369 U.S. 31 (1962); *Morgan v. Virginia*, 328 U.S. 373 (1946). The decision below cannot be squared with those decisions.

I. THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER 42 U.S.C. § 1983 APPLIES TO VIOLATIONS OF THE COMMERCE CLAUSE

In holding that 42 U.S.C. § 1983 does not provide redress for violations of the Commerce Clause, the Supreme Court of Nebraska acknowledged that there is a division of authority on the question (App. 5a). Its decision agrees with decisions of the Seventh,[6] Eighth,[7] Ninth[8] and Tenth[9] Circuits and a number of state court decisions.[10] All of these rely primarily on the reasoning set forth in the Eighth Circuit's decision in *Consolidated Freightways Corp. v. Kassel* that the Commerce Clause

---

[6] *Pesticide Public Policy Foundation v. Village of Wauconda, Ill.*, 826 F.2d 1068 (7th Cir. 1987), *affirming without opinion* 622 F. Supp. 423 (N.D. Ill. 1985).

[7] *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984).

[8] *Kraft v. Jacka*, 872 F.2d 862 (9th Cir. 1989).

[9] *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469 (10th Cir. 1985).

[10] *Private Truck Council of America, Inc. v. New Hampshire*, 128 N.H. 466, 517 A.2d 1150 (1986); *Private Truck Council of America, Inc. v. New Jersey*, 221 N.J. Super. 89, 534 A.2d 13 (N.J. Super. Ct. App. Div. 1987), *aff'd*, 111 N.J. 214, 544 A.2d 33 (1988); *American Trucking Associations, Inc. v. Conway*, 146 Vt. 574, 508 A.2d 405 (1986), *cert. denied*, 483 U.S. 1020 (1987); *Private Truck Council of America, Inc. v. Sec'y of State*, 503 A.2d 214 (Me.), *cert. denied*, 476 U.S. 1129 (1986); *Georgia v. Private Truck Council of America, Inc.*, 258 Ga. 531, 371 S.E.2d 378 (1988); *Private Truck Council of America, Inc. v. Florida Department of Revenue*, 531 So.2d 367 (Fla. Dist. Ct. App. 1988).

merely "allocates power between the state and federal governments" and does not secure individual rights.

The decision below, however, conflicts with decisions of the Third, Sixth and Eleventh Circuits. For example, in *Kennecott Corp. v. Smith*, 637 F.2d 181 (3rd Cir. 1980), the Third Circuit squarely held that § 1983 encompasses Commerce Clause claims. The court stated:

> The present action is properly brought under § 1983 because it seeks redress for deprivations of constitutional rights secured by the commerce clause and of federal statutory rights protected by the Williams Act. *See Maine v. Thiboutot*, [448] U.S. [1], 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980).

637 F.2d at 186 n.5. The same conclusion was reached in *Continental Illinois Corp. v. Lewis*, 838 F.2d 457, 458 (11th Cir. 1988), *vacated on other grounds*, 110 S.Ct. 1249, 58 U.S.L.W. 4330 (1990); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 562 (6th Cir. 1982); *ANR Pipeline Company v. Michigan Public Service Commission*, 608 F. Supp. 43, 48 (W.D. Mich. 1984); and *Confederated Salish and Kootenai Tribes v. Moe*, 392 F. Supp. 1297, 1304-1305 (D. Mont. 1975), *aff'd*, 425 U.S. 463 (1976). This Court recently reviewed the Eleventh Circuit's decision in *Continental Illinois Corp. v. Lewis*, but found it unnecessary to decide the § 1983 issue because it found that events had mooted the underlying controversy and it therefore vacated the circuit court's decision. 58 U.S.L.W. at 4333.

This conflict among the circuits and the state supreme courts warrants this Court's review. The issue has arisen in many cases in recent years. It is likely to recur in almost every case challenging state laws and actions under the Commerce Clause and may also arise with respect to other constitutional provisions to which the rationale of the court below could be extended. This case presents the issue squarely and is an appropriate case in which to consider and resolve the issue.

II. THE DECISION OF THE NEBRASKA SUPREME COURT THAT THE COMMERCE CLAUSE DOES NOT SECURE PERSONAL RIGHTS IS CONTRARY TO NUMEROUS DECISIONS OF THIS COURT

The conclusion of the court below and other courts that the Commerce Clause does not establish personal rights that may be redressed under § 1983 is also directly in conflict with decisions of this Court applying the Commerce Clause, and it would have anomalous and far-reaching consequences. While the underlying purpose of the Commerce Clause is to "create an area of free trade among the several States," *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944), this Court has made clear that it does so by creating personal rights, which individuals may enforce, to be free of discriminatory and excessive taxation and regulatory burdens imposed by state governments. In *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 320 n.3 (1977), for example, the Court held that certain stock exchanges had standing to challenge a New York tax that discriminated against them and their members, stating (emphasis supplied): "The Exchanges are asserting *their right under the Commerce Clause* to engage in interstate commerce free of discriminatory taxes on their business . . . ." Similarly, in *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967), the Court stated: "There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one. *Western Union Tel. Co. v. State of Kansas*, 216 U.S. 1, 30 S.Ct. 190, 54 L.Ed. 355." In these and many other cases, the Court has used and understood the term "right" to mean any legal privilege or protection which a person may enforce by judicial action.

The personal nature of the rights secured by the Commerce Clause is perhaps most dramatically illustrated by this Court's landmark civil rights decision which struck down racially discriminatory state laws as violations of

the Commerce Clause. In *Morgan v. Virginia*, 328 U.S. 373 (1946), the Court upheld an individual passenger's Commerce Clause challenge to a Virginia statute requiring racial segregation on interstate buses. Significantly, the Court rejected a challenge to the passenger's standing to invoke the Commerce Clause; the Court stated:

> We think . . . that the appellant is a proper person to challenge the validity of this statute as a burden on commerce . . . . *Constitutional protection against burdens on commerce is for her benefit* on a criminal trial for violation of the challenged statute.

Id. at 376-377 (emphasis supplied, footnote omitted). *Accord*, *Bailey v. Patterson*, 369 U.S. 31 (1962). *See also Edwards v. California*, 314 U.S. 160 (1941), and *United States v. Guest*, 383 U.S. 745, 757-760 (1966), recognizing a "constitutional right to travel from one State to another" based on the Commerce Clause. Although they were cited to it, the court below made no reference in its opinion to the foregoing decisions of this Court, and its ruling that the Commerce Clause does not secure personal rights simply cannot be reconciled with those decisions.

Furthermore, contrary to the conclusion of the court below and other courts that have adopted the rationale of the Eighth Circuit in *Consolidated Freightways Corp. v. Kassel*, there is simply no rational or workable principle upon which constitutional provisions can be divided among those that create "individual rights" on the one hand and those that, in the words of the Eighth Circuit, merely "allocate[] power between the state and federal governments."[11] If accepted, the rationale of the court below and the Eighth Circuit could be extended to a host of constitutional provisions including, for example, all of the powers of Congress in Article I, Section 8 and all of the restrictions in Article I, Section 10 upon states, such as those prohibiting bills of attainder, ex post facto laws,

---

[11] *Consolidated Freightways Corp. v. Kassel*, 730 F.2d at 1144.

laws impairing contracts, and duties on exports and imports. Taking this purported distinction to its logical conclusion could even lead to the determination that the First and Fourteenth Amendments create no "individual rights" redressable by § 1983 because they are phrased in terms of limitations on the powers of the federal and state governments.[12]

To petitioner, his right under the Commerce Clause to conduct his trucking business among the several states free from discriminatory or unduly burdensome state laws is as vital as any other right the Constitution secures to him. His livelihood depends on it.

III. WHETHER 42 U.S.C. § 1983 APPLIES TO COMMERCE CLAUSE VIOLATIONS IS EXTREMELY IMPORTANT TO THE EFFECTIVE ENFORCEMENT OF THAT CLAUSE, AS THIS CASE ILLUSTRATES

The issue in this case is also extremely important for the effective enforcement of the Commerce Clause, particularly in cases like this one. Its principal importance relates to the ability of persons who have been injured by

---

[12] The court below and the Eighth Circuit in *Kassel* erroneously analogized the Commerce Clause to the Supremacy Clause. The Supremacy Clause, however, is very different from the Commerce Clause, and indeed, from any other provision of the federal Constitution. The Supremacy Clause is merely a declaration of the supremacy of the federal Constitution and federal laws over state laws; as this Court noted in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 613 (1979), it is not itself "a source of any federal rights." *See also Golden State Transit Corp. v. City of Los Angeles*, 110 S.Ct. 444, 58 U.S.L.W. 4033 (1989). The Commerce Clause, in contrast, clearly *is* a "source of . . . federal rights" which individuals may enforce, and in that respect it is no different from the Ex Post Facto Clause or the Bill of Attainder Clause or any other substantive limitation on the power of states contained in the Constitution. Since those are all limitations that individuals may personally enforce by judicial action, each of those clauses can only be regarded as establishing personal constitutional "rights."

the violation of their rights under the Commerce Clause to recover litigation expenses and attorneys' fees under 42 U.S.C. § 1988, the attorneys' fees counterpart to § 1983. If such persons are entitled to injunctive relief or damages under § 1983 against the responsible state officials, they would ordinarily be entitled to recover attorneys' fees and litigation expenses from the entities whom those officials represent, even if relief were actually awarded on another ground. *Maher v. Gagne*, 448 U.S. 122, 132 n.15 (1980); *Maine v. Thiboutot*, 448 U.S. 1, 10-11 (1980); *Hutto v. Finney*, 437 U.S. 678, 693-694 (1978).[13]

When Congress enacted § 1988 in 1976, it recognized that the ability of plaintiffs to recover litigation costs and attorneys' fees is often essential to the effective pro-

---

[13] In *Will v. Michigan Department of State Police*, 109 S.Ct. 2304 (1989), the Court held that neither states nor state officials sued in their official capacities for money damages are "persons" that are subject to suit under § 1983. The Court, however, also stated: "Of course, a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" 109 S.Ct. at 2311 n.10 (quoting *Kentucky v. Graham*, 473 U.S. 159, 167, n.14 (1985)). The Court has also held that attorneys' fees under § 1988 may be recovered from a state or state agency in actions for injunctive relief against state officials. *Hutto v. Finney*, 437 U.S. 678 (1978). In this case, petitioner sued respondents' predecessors in their official capacities and sought and obtained injunctive relief against them.

Since the action sought prospective relief against state officials acting in their official capacities, this case does not present the question of whether a state may assert sovereign immunity against a § 1983 action, which is the question under review in *Howlett v. Rose*, 537 So.2d 706 (Fla. Dist. Ct. App.), *review denied*, 545 So.2d 1367 (Fla. 1989), *cert. granted*, 110 S.Ct. 403 (1989) (No. 89-5383), argued March 20, 1990. Moreover, Nebraska has never asserted sovereign immunity against § 1983 actions in its own courts. On the contrary, its decisions recognize such actions. *See Maldonado v. Nebraska Department of Public Welfare*, 223 Neb. 485, 391 N.W.2d 105, 109-110 (1986).

tection of their constitutional rights. In *Maine v. Thiboutot*, this Court noted that "Congress viewed the fees authorized by § 1988 as 'an integral part of the remedies necessary to obtain' compliance with § 1983. S. Rep. No. 94-1011, p. 5 (1976)." 448 U.S. at 11. *See also Hutto v. Finney*, 437 U.S. at 694. Furthermore, Congress enacted § 1988 in recognition of the fact that parties who bring suit under § 1983 and prevail are typically seeking not only to redress their own injuries but also to vindicate important civil and constitutional rights of many other people and the public at large. *See City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986). As the House Report accompanying § 1988 noted, a person who obtains injunctive relief under § 1983 " 'does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest importance.' " H.R. Rep. No. 94-1558, p. 2 (1976) (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)).

Section 1988 is no less important in vindicating the vital public and national interests in the free flow of interstate commerce, and the policies underlying § 1988 are fully applicable to Commerce Clause cases like this one. In many cases, including this one, a state tax, regulation or practice that violates the Commerce Clause will impose a cost on persons and companies that is substantially less, in the case of even the largest companies, than the expense would be of bringing a lawsuit to challenge it. If, as in this case, the state's procedures do not permit a class action, the prospect of recovering expenses and attorneys' fees under 42 U.S.C. § 1988 will be the only practical means of bringing suit to invalidate and enjoin the tax.

If recovery under § 1988 is denied, the result in this case will be to impose on petitioner and his attorneys the entire cost of bringing and prosecuting an action that succeeded in striking down an unconstitutional tax

and saving thousands of interstate motor carriers millions of dollars. Faced with that outcome, few persons would bring such actions in the future. The substantial costs and burdens of litigation would thus serve as an effective deterrent to judicial challenges to laws of states like Nebraska that discriminate against or otherwise unduly burden interstate commerce, contrary to the interests of the nation as a whole.[14]

In addition to precluding recovery of costs and attorneys' fees, denial of a Commerce Clause claim under § 1983 would also preclude recovery of damages from persons acting under color of state law in cases where such damages would be appropriate—for example, where the defendants had acted in bad faith and therefore had no qualified immunity from personal liability for damages. If, for example, state or local officials followed a policy of subjecting interstate travellers or merchants to harassment on the basis of their race, or state of origin, or the state of origin of their commodities, the victims of such treatment would, under the ruling of the Nebraska Supreme Court have no entitlement to damages under § 1983 even though the conduct clearly contravened the Commerce Clause under this Court's rulings. *See, e.g., Morgan v. Virginia*, 328 U.S. 373 (1946); *United States v. Guest*, 383 U.S. 745 (1966). That result, petitioner submits, has no basis in § 1983. It presents, in any event, an important question warranting this Court's review.

---

[14] In some cases, of course, associations of taxpayers or of other victims of unconstitutional state action may fund litigation challenging unconstitutional state taxes or other laws. In other cases, there may not be associations with sufficient resources to do so. In the case of PTCA's litigation against retaliatory taxes, PTCA was able to undertake that effort only because its attorneys were willing to represent the plaintiffs on a contingent fee basis. Even where associations or others fund the litigation, Congress enacted § 1988 to impose those expenses on the party whose unconstitutional acts gave rise to the expenses rather than on the victims of those acts or their representatives.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Nebraska should be granted.

Respectfully submitted,

RICHARD A. ALLEN
(Counsel of Record)
ZUCKERT, SCOUTT & RASENBERGER
888 Seventeenth Street, N.W.
Suite 600
Washington, D.C. 20006
(202) 298-8660

RICHARD L. SPANGLER, JR.
WOODS & AITKEN
1500 American Charter Center
206 South 13th Street
Lincoln, Nebraska 68508
(402) 474-0321

April 5, 1990

APPENDICES

APPENDIX A

OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

MARK E. DENNIS, doing business as DENNIS TRUCKING,
Appellant and Cross-Appellee,

v.

STATE OF NEBRASKA, *et al.*,
Appellees and Cross-Appellants.

Case Caption

DENNIS v. STATE

Filed February 16, 1990. No. 88-205

Appeal from the District Court for Lancaster County: Bernard J. McGinn, Judge. Affirmed in part, and in part reversed.

Richard A. Allen and Richard P. Schweitzer, of Zuckert, Scoutt & Rasenberger, and Richard L. Spangler, of Woods, Aitken, Smith, Greer, Overcash & Spangler, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl Schroeder for appellees.

1. Constitutional Law: Civil Rights: Actions. There is no cause of action under 42 U.S.C. § 1983 (1982) for violations of the commerce clause.

2. Constitutional Law: Statutes. The purpose of the privileges and immunities clause is to outlaw classifications based on the fact of noncitizenship unless there is something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed.

3. ——: ——. Statutes which do not make a distinction based upon residence or citizenship do not violate the privileges and immunities clause.

4. Attorney Fees. Where one has gone into a court of equity and, taking the risk of litigation on himself, has created or preserved or protected a fund in which others are entitled to share, such others will be required to contribute their share to the reasonable costs and expenses of the litigation, including reasonable fees to the litigant's counsel.

5. ——. The common fund must be an immediate fund from which attorney fees may be awarded at trial.

6. ——. The common fund theory requires for an award of attorney fees under the common benefit rationale (1) as ascertainable class of beneficiaries, easly identifiable, and (2) a source of funds common to the class from which the award can be made.

Hastings, C.J., Boslaugh, White, Caporale, Shanahan, and Grant, JJ.

BOSLAUGH, J.

The plaintiff, Mark E. Dennis, doing business as Dennis Trucking, commenced this action to obtain a judgment declaring taxes imposed pursuant to Neb. Rev. Stat. §§ 60-305.02 and 60-305.03 (Reissue 1984) to be unconstitutional and enjoining the defendants from assessing or collecting such taxes, and to recover the plaintiff's attorney fees and costs of the action. Named as defendants were the State of Nebraska; Holly Jensen, individually and as director of the Nebraska Department of Motor Vehicles; Lou Lamberty, individually and as director of the Nebraska Department of Roads; and Kay Orr, individually and as Nebraska Treasurer.

The plaintiff alleged that the taxes and fees imposed under §§ 60-305.02 and 60-305.03 were an unlawful burden on interstate commerce in violation of U.S. Const. art. I, § 8, cl. 3; constituted a denial of the plaintiff's privileges and immunities in violation of U.S. Const. art. IV, § 2, cl 1; constituted a grant by the Legislature of special and exclusive privileges, immunities, and franchises in violation of Neb. Const. art. III, § 18; and violated 42 U.S.C. § 1983 (1982) by depriving the plaintiff of rights secured by the U.S. Constitution.

After a trial to the court on stipulated facts, the trial court held that the statutes were in violation of the commerce clause, U.S. Const. art. I, § 8, cl. 3, and permanently enjoined the defendants from assessing, levying, or collecting taxes or fees pursuant to §§ 60-305.02 and 60-305.03. The trial court dismissed the remaining counts, holding that the plaintiff had failed to prove he was entitled to judgment under U.S. Const. art. IV, § 2, cl. 1; Neb. Const. art. III, § 18; or 42 U.S.C. 1983.

The order of the trial court further provided:

> The plaintiff and his attorneys are entitled under the Equitable Fund Doctrine to payment of their expenses and reasonable fees. The Court shall determine the amount of any such expenses and fees by subsequent order following the submission of documentation in support thereof and a showing regarding any fund available for payment of said fees and expenses."

The plaintiff's motion for new trial, which was overruled, alleged that the common fund from which his attorneys' costs and fees may be paid was the total amount of taxes available for refunds pursuant to the court's order.

The plaintiff has appealed, contending that the district court erred in denying his claims under 42 U.S.C. § 1983 and in denying his claim that the common fund from which litigation costs and attorney fees may be paid consists of the total amount of taxes subject to refund as a result of the court's holding. The defendants have cross-appealed, claiming that the trial court erred in finding that the plaintiff and his attorneys were entitled under the equitable fund doctrine to payment of their expenses and reasonable fees. The defendants have not appealed the district court's finding that the statutes were in violation of the commerce clause, and there is no issue in that regard on this appeal. Both sections have since been amended. See §§ 60-305.02 and 60-305.03 (Reissue 1988).

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), provides that attorney fees may be awarded to the prevailing party, other than the United States, in any action to enforce a provision of § 1983. Furthermore, a party who prevails on a ground other than § 1983 is entitled to attorney fees under § 1988 if § 1983 would have been an appropriate basis for relief. *Consol. Freightways Corp. of Del. v. Kassel*, 730 F.2d 1139 (8th Cir. 1984), *cert. denied* 469 U.S. 834, 105 S. Ct. 126, 83 L. Ed. 2d 68; *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469 (10th Cir. 1985); *Private Truck Council v. Secretary of State*, 503 A.2d 214 (Me. 1986), *cert. denied*, 476 U.S. 1129, 106 S. Ct. 1997, 90 L. Ed. 2d 677.

The issues presented by the plaintiff's first assignment of error are, therefore, (1) whether a violation of the commerce clause constitutes a cause of action under § 1983 and (2) whether § 1983 would have been an appropriate basis for relief in this case.

Despite the broad language of § 1983 and the fact that there appears to be a division of authority on the question as to whether there is a cause of action under § 1983 for violations of the commerce clause, we believe the better reasoned cases hold that there is no cause of action under § 1983 for violations of the commerce clause. The leading authority appears to be *Consol. Freightways Corp. of Del. v. Kassel, supra*, in which the court held that "the Commerce Clause does not establish individual rights against government, but instead allocates power between the state and federal governments." *Id.* at 1144. Cases involving the supremacy clause and reaching the same result are *Golden State Transit Corp. v. City of Los Angeles*, —— U.S. ——, 110 S. Ct. 444, 107 L. Ed. 2d 420 (1989) (the supremacy clause, of its own force,

does not create rights enforceable under § 1983); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 99 S. Ct. 1905, 60 L. Ed. 2d 508 (1979); *White Mountain Apache Tribe v. Williams*, 810 F.2d 844 (9th Cir. 1987) (preemption of state law under the supremacy clause does not give rise to a cause of action under § 1983); *Gould, Inc. v. Wisconsin Dept. of Industry, Labor*, 750 F.2d 608 (7th Cir. 1984), *aff'd* 475 U.S. 282, 106 S. Ct. 1057, 89 L. Ed. 2d 223 (1986) (action brought by corporation alleging that state statutes were preempted by federal labor law, in violation of the supremacy clause, was not cognizable under § 1983); and *Maryland Pest Control v. Montgomery County, Md.*, 884 F.2d 160 (4th Cir. 1989) (the supremacy clause does not secure rights within the meaning of § 1983 so as to entitle a successful litigant to attorney fees pursuant to § 1988).

In *Consol. Freightways Corp. of Del. v. Kassel, supra*, Consolidated Freightways sought attorney fees under 42 U.S.C. § 1983 after Iowa's statute restricting Consolidated's use of 65-foot twin trailers was declared invalid as a violation of the commerce clause. The U.S. Court of Appeals for the Eighth Circuit held that a violation of the commerce clause did not constitute a claim under § 1983.

> Iowa contends that the Commerce Clause does not establish individual rights against government, but instead allocates power between the state and federal governments. On the basis of the nature of the Commerce power as defined by the case law . . . we must agree with the interpretation of the Commerce Clause as an allocating provision, not one that secures rights cognizable under § 1983.
>
> The Commerce Clause grants to Congress the power to regulate interstate commerce. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824). That grant of power has been held to imply a limitation upon the states. [Citations omitted.]

> It is clear from the language employed by the Supreme Court in Commerce Clause cases that the Commerce Clause deals with the relationship between national and state interests, not the protection of individual rights. These decisions are replete with references to the *national* or *federal interest* in preventing the burdensome state regulation of interstate commerce. [Citations omitted.]
>
> In the Supreme Court's opinion in this very case the emphasis is on the role of the Commerce Clause in preventing state regulation from "trespass[ing] upon *national interests.*" *Kassel v. Consolidated Freightways*, 450 U.S. 662, 669, 101 S.Ct. 1309, 1315, 67 L.Ed.2d 580 (1981) (emphasis added). In striking down the Iowa truck-length limitations, the Court stated that Iowa's "regulations impair significantly the *federal interest* in efficient and safe interstate transportation . . . ." *Id.* at 671, 101 S.Ct. at 1316 (emphasis added). No where does the Court refer to the impairment, infringement, or protection of the interests or rights of the individual. Throughout the Commerce Clause cases the emphasis is on the relationship between conflicting federal and state interests, not the relationship between the individual and the state. [Citation omitted.]
>
> To support its theory that the Commerce Clause secures rights cognizable under § 1983, Consolidated has cited several Supreme Court cases which refer to a Constitutional "right" to engage in interstate commerce. . . . Although these cases do refer to engaging in interstate commerce as a constitutional right, such cases were not dealing with the question of whether the Commerce Clause secures individual rights within the meaning of § 1983. In *Garrity* [*v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967),] the reference to interstate commerce was mere dictum, and in both *Western Union* [*Tel. Co. v.*

Kansas, 216 U.S. 1, 30 S. Ct. 190, 54 L. Ed. 355 (1910),] and *Crutcher* [*v. Kentucky*, 141 U.S. 47, 11 S. Ct. 851, 35 L. Ed. 649 (1891)], the focus of the Court's opinions was on the separation of powers between the national and state legislatures. Despite these references to a right to engage in interstate commerce, we agree with the district court that the Commerce Clause was adopted, and the dormant Commerce Clause doctrine evolved, not to protect individual rights, but to further the national interest in an efficient economy. [Citation omitted.]

Although individuals are oftentimes benefited through the indirect protection resulting from the limitations placed on the states through the dormant Commerce Clause doctrine, such benefit is not the same thing as a "right" secured by the Constitution within the meaning of § 1983.

(Emphasis in original.) *Consol. Freightways Corp. of Del. v. Kassel*, 730 F.2d 1139, 1144-45 (8th Cir. 1984). The court concluded:

In *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), Justice Douglas discerned three purposes underlying the original enactment of § 1983: (1) to override discriminatory state laws; (2) to provide a remedy where state law was inadequate; and (3) to provide a federal remedy where the state remedy, although adequate in theory, was not available in practice. [Citation omitted.] To hold that an alleged violation of the Commerce Clause constitutes an action cognizable under § 1983 would fail to serve any of these purposes and would be an unwarranted extension of the Civil Rights Act. We do not believe that such a cause of action was within the intent of the Congress that enacted the civil rights statutes, nor do we believe that such an interpretation of the scope of § 1983 is mandated by either

the language of § 1983 or the nature of the Commerce Clause. We therefore hold that § 1983 does not provide a remedy for a dormant Commerce Clause claim.

730 F.2d at 1146-47.

In *Kraft v. Jacka*, 872 F.2d 862 (9th Cir. 1989), the plaintiffs brought a § 1983 action against members of the Nevada Gaming Control Board after the board refused to extend further licensing to the plaintiffs when their 1-year limited gaming licenses expired. The plaintiffs alleged their civil rights had been violated because they had been deprived of protected property and liberty interests without due process of law.

The U.S. Court of Appeals for the Ninth Circuit held that the corporate plaintiffs had no protected property interests in further licensing and could not state a claim under § 1983 for an alleged violation of the commerce clause. The plaintiffs also failed to establish a protected interest in reputation. Since they had no protected property or liberty interests, the plaintiffs could not show that their due process rights had been violated. The court further held that the denial of the license application, based partly on individual plaintiff Kraft's personal association with an unsuitable person, did not violate Kraft's free association right.

The plaintiffs in *Kraft* also alleged that the board violated their constitutional rights by issuing a stop order as to an out-of-state sale of corporate securities, contending that the board's action deprived them of corporate property in violation of the commerce clause and, thus, in violation of § 1983. The court rejected this contention.

The Commerce Clause places restraints upon the power of the states. *Philadelphia v. New Jersey*, 437 U.S. 617, 623, 98 S. Ct. 2531, 2535, 57 L.Ed.2d 475 (1978). It divides power between the states and the federal government. We have previously stated that

> "§ 1983 was not intended to encompass those constitutional provisions which allocate power between the state and federal government." *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 848 (9th Cir. 1984) (Supremacy Clause, which establishes federal-state priorities, does not secure individual rights under § 1983), *cert. denied*, 479 U.S. 1060, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987); *see also Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1144 (8th Cir. 1984) (The Commerce Clause is "an allocating provision, not one that secures rights cognizable under § 1983."), *cert. denied*, 469 U.S. 834, 105 S.Ct. 126, 83 L.Ed.2d 68 (1984). Thus, assuming that the Board's actions in any way implicated the Commerce Clause, the plaintiffs cannot state a cause of action under § 1983 for violation of the Clause.

872 F.2d at 869.

In *J & J Anderson v. Town of Erie*, 767 F.2d 1469 (10th Cir. 1985), the board of trustees of the town of Erie, Colorado, enacted an ordinance prohibiting any ultralight aircraft from landing or taking off within the town. The ordinance was enacted in response to noise complaints. The plaintiffs, an ultralight aircraft company and three pilots, brought a § 1983 action alleging that the ordinance denied them their rights to equal protection and constituted a "taking" of their rights to carry on a lawful occupation, to own and enjoy private property, and of freedom of transit through navigable airspace pursuant to 49 U.S.C. app. § 1304 (1982), in violation of the just compensation clause of the fifth amendment.

Although the issues between the parties were ultimately resolved by the repeal of the ordinance, the plaintiffs requested costs and attorney fees pursuant to 42 U.S.C. § 1988. The plaintiffs argued that they would have substantially prevailed on their § 1983 claim because

certain federal regulations preempted the effect of the ordinance. The U.S. Court of Appeals for the Tenth Circuit stated:

> The Commerce Clause does, by implication, limit state and municipal authority to enact laws regulating interstate commerce. . . . However, it has been recognized that when a compelling public interest, such as community safety, is involved, the states and municipalities have a legitimate local concern which may be regulated by a zoning ordinance, notwithstanding the fact that such ordinance affects interstate commerce. . . .
>
> The Commerce Clause of the Constitution, Art .1, § 8, cl. 3, is a limitation upon the power of the states to regulate commerce. However, state regulations touching upon safety may be valid if they do not place a substantial burden on interstate commerce. . . . . In any event, the Commerce Clause deals with the relationship between national and state interests, and does not deal with the protection of individual rights. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 101 S.Ct. 1309, 67 L.Ed.2d 580 (1981); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978); *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959). The Commerce Clause does not secure rights cognizable under 42 U.S.C. § 1983 in that a Commerce Clause violation would not deprive an individual of any right, privilege, or immunity secured by the Constitution. *Consolidated Freightways Corp. of Delaware v. Kassel, supra*, 730 F.2d at 1144. Accordingly, the Court there held that the claim for attorney's fees pursuant to 42 U.S.C. § 1988 was not well taken.

767 F.2d at 1476. The court held:

> The Commerce Clause and the Supremacy Clause, although limiting the power of the states to inter-

> fere in areas of national concern, do not secure rights cognizable under § 1983. This section was enacted to insure a "right of action to enforce the protections of the Fourteenth Amendment and the federal laws enacted thereto." *Chapman v. Houston Welfare Rights Organization*, *supra*, 441 U.S. at 611, 99 S.Ct. at 913. Thus, § 1983 does not provide a remedy for claims resulting from violations of the Commerce Clause or the Supremacy Clause. It follows that an attorney's fee claim under § 1988, based on a § 1983 action involving an alleged violation of the Commerce Clause and the Supremacy Clause of the Constitution of the United States, can have no merit.

767 F.2d at 1476-77. The court further found that the plaintiffs could not have substantially prevailed on their § 1983 "taking" claim and were not entitled to attorney fees pursuant to § 1988.

In *Pesticide Public Policy v. Village of Wauconda*, 622 F. Supp. 423 (N.D. Ill. 1985), *aff'd* 826 F.2d 1068 (7th Cir. 1987), the plaintiff foundation challenged the validity of an ordinance regulating the use of pesticides in the defendant village. The foundation claimed that the village lacked authority to enact the ordinance and that the ordinance was preempted by Illinois law. The foundation further claimed that the ordinance denied foundation members due process and equal protection of law, constituted special legislation, and violated the commerce clause of the U.S. Constitution. The foundation also contended that the village was liable to individual foundation members for money damages pursuant to § 1983.

The court held that Illinois state law preempted the village's regulation of pesticides. The ordinance, therefore, was invalid under Illinois law.

As to § 1983 liability, the court held that the foundation did not have standing to sue for a declaration that its members were entitled to damages. The court found

that, even if the foundation had standing, damages were not available as a matter of law under any of the foundation's § 1983 claims:

> Section 1983 was enacted to override discriminatory state laws and provide a remedy where state law was inadequate or unenforced. *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). The appellate courts reasoned that the function of both the Supremacy Clause and the Commerce Clause relates not to individual rights, but rather to the distribution of power between the state and federal governments. "Both the Supremacy and Commerce Clauses 'limit the power of a state to interfere with areas of national concern.'" *Gould, [Inc. v. Wisconsin Dept. of Industry, Labor*, 750 F.2d 608, 616 (7th Cir. 1984), quoting *Consol. Freightways Corp. of Del. v. Kassel*, 730 F.2d 1139 (8th Cir. 1984).] Thus, the Seventh Circuit declined to award attorneys' fees under 42 U.S.C. § 1988 based solely on Gould's success on its federal preemption claims, just as the Eighth Circuit refused to award attorneys' fees based on a Commerce Clause violation.
>
> Therefore, even if the Foundation succeeded on its federal preemption claim, Count I, that would not entitle it to a declaration that the Village is liable for damages under Section 1983. Likewise, Count V of the complaint, which alleges that the Wauconda ordinance violates the Commerce Clause, does not provide a basis for damages under Section 1983.

622 F. Supp. at 435-36.

The court further held that the ordinance did not deprive foundation members of equal protection of the laws or violate the Illinois Constitution's prohibition against special legislation.

In *Private Truck Council v. Secretary of State*, 503 A.2d 214 (Me. 1986), a class action was brought by and

on behalf of out-of-state truckers, contesting the validity of Maine's reciprocal truck taxes. An escrow fund comprised of all moneys collected under the disputed statute after January 2, 1985, was established during the pendency of the action. The trial court found that the statute was in violation of the commerce clause, but refused to order any refund of tax moneys "except to the extent that the plaintiff class had been protected by [the] escrow arrangement . . . ." *Id.* at 216. The trial court also denied the plaintiffs' request for allowance of attorney fees. The State appealed the trial court's action in declaring the statute unconstitutional. The plaintiffs also appealed, contending that their relief should not be limited to reimbursement of the funds in escrow and that they were entitled to recover attorney fees pursuant to § 1988 because they brought their action alternatively under § 1983.

In affirming the decision of the trial court, the Supreme Judicial Court of Maine held that the statute was in violation of the commerce clause and determined that the trial court properly ordered a refund of only the moneys held in escrow. The court further held that the plaintiffs were not entitled to recover attorney fees pursuant to § 1988.

> [P]laintiffs failed . . . to state a claim for relief cognizable under section 1983. We are convinced that Congress never intended to make a violation or the Commerce Clause actionable under that section of the Civil Rights Act. The Eighth Circuit has so held in a well-reasoned opinion in *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139 (8th Cir.), *cert. denied*, [469 U.S. 834], 105 S.Ct. 126, 83 L.Ed.2d 68 (1984). Although the United States Supreme Court has not addressed this issue so far as the Commerce Clause is concerned, it did hold in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979), that the

> Supremacy Clause does not give rise to a claim of right "secured by the Constitution" within the meaning of 28 U.S.C. § 1343(3), a jurisdictional counterpart to section 1983. *Id.* at 615, 99 S.Ct. at 1914. *See also Gould, Inc. v. Wisconsin Department of Industry, Labor and Human Relations*, 750 F.2d 608, 616 (7th Cir. 1984) (Supremacy Clause violation does not present a cognizable claim under section 1983).

503 A.2d at 221. The court adopted the reasoning of *Consol. Freightways Corp. of Del. v. Kassel*, 730 F.2d 1139 (8th Cir. 1984), and stated:

> We find unpersuasive, as did the Eighth Circuit, two earlier federal cases stating terse holdings going the other way. *Kennecott Corp. v. Smith*, 637 F.2d 181, 1[illegible] n.5 (3d Cir. 1980); *Confederated Salish and Kootenai Tribes v. Moe*, 392 F.Supp. 1297, 1304-05, (D.Mont. 1975), *aff'd*, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976). Neither of those cases analyzed the merits of extending section 1983 to encompass violations of the Commerce Clause, but rather merely relied on generalized statements in Supreme Court cases that did not involve the Commerce Clause issue. *Consolidated Freightways*, 730 F.2d at 1142-43.

503 A.2d at 222.

In *Private Truck Council of America v. State*, 128 N.H. 466, 517 A.2d 1150 (1986), the New Hampshire Supreme Court held that a state statute imposing taxes and fees on motor carriers whose vehicles were registered in nine other states discriminated against interstate commerce, in violation of the commerce clause. The court also determined that the plaintiffs (which were corporations) had not been properly certified as a class and, therefore, could not invoke the protection of the privileges and immunities clause, U.S. Const. art. IV, § 2, cl. 1.

The court held that the plaintiffs were not entitled to tax refunds or attorney fees pursuant to § 1988:

> The purposes underlying the original enactment of section 1983 were to override discriminatory state laws, to provide a remedy where state law was inadequate, and to provide a federal remedy where the state remedy, although adequate in theory, was unavailable in practice. *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961), *overruled on other grounds*, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). Although the plaintiffs argue that section 1983 provides redress for "any" violation of constitutional or federal statutory rights, section 1983 has not been so construed. *See Chapman v. Houston Welfare Rights Organization*,, 441 U.S. 600, 615-20 (1979) (supremacy clause violation not redressable under § 1983); *Poirer v. Hodges*, 445 F. Supp. 838, 842 (M.D. Fla. 1978) (contract clause violation not redressable under § 1983.
>
> We do not believe that the purposes of section 1983 would be furthered by a holding that a violation of the commerce clause is redressable through an action under that statute. The United States Court of Appeals for the Eighth Circuit has held that a violation of the commerce clause is not a basis for applying section 1983. *Consol. Freightways Corp. of Del. v. Kassel*, 730 F.2d 1139 (8th Cir.), *cert. denied*, 105 S.Ct. 126 (1984);,*see also Private Truck Council v. Secretary of State*, 503 A.2d at 220-22. *But see Kennecott Corp. v. Smith*, 637 F.2d 181, 186 n.5 (3d Cir. 1980); *Confederated Salish & Kootenai Tribes v. Moe*, 392 F. Supp. 1297, 1304-05 (D. Mont. 1974), *aff'd on other grounds*, 425 U.S. 463 1976). The Eighth Circuit based its holding on the ground that the commerce clause does not establish individual rights, but rather allocates power between State and federal governments. *Kassel*, *supra* at 1144.

> Both the Commerce Clause and the Supremacy Clause "limit the power of a state to interfere with areas of national concern. Just as the Supremacy Clause does not secure rights within the meaning of § 1983, neither does the Commerce Clause." *Kassel*, 730 F.2d at 1144 (footnote omitted). "The Commerce Clause created no rights or privileges; it established no law other than the law of jurisdiction to regulate those engaged in interstate or foreign commerce." *Id.* at 1145 (quoting B. GAVIT, COMMERCE CLAUSE, 32-33 (1932)). The Eighth Circuit concluded that "[a]lthough individuals are oftentimes benefited through the indirect protection resulting from the limitations placed on the states through the dormant Commerce Clause doctrine, such benefit is not the same thing as a 'right' secured by the Constitution within the meaning of § 1983." *Id.*
>
> We agree that a commerce clause violation is not redressable under section 1983. We therefore deny the plaintiffs' claims for refunds of taxes paid before the establishment of the escrow fund. The plaintiffs' claims for attorney's fees also must fail. The plaintiffs have not stated a cause of action under section 1983, and thus cannot recover attorney's fees under 42 U.S.C. § 1988 (1982), which provides for attorney's fees in, *inter alia*, section 1983 actions.

128 N.H. at 476-77, 517 A.2d at 1157.

In *Private Truck Council v. State*, 221 N.J. Super. 89, 534 A.2d 13 (1987), *aff'd* 111 N.J. 214, 544 A.2d 33 (1988), the plaintiffs challenged the constitutionality of a retaliatory tax imposed on certain trucking operations, claiming that New Jersey's Counterpart Fee Act violated the commerce clause and the privileges and immunities clause of the U.S. Constitution. The plaintiffs also contended that they were entitled to refunds of the moneys unlawfully collected, as well as counsel fees and costs under § 1983.

The appellate division of the New Jersey Superior Court determined that the tax was in violation of the commerce clause and found that the plaintiffs were entitled to refunds from the date their complaint was filed. The court did not consider the merits of the plaintiffs' claim that the act was unconstitutional under the privileges and immunities clause. With respect to the plaintiffs' request for counsel fees, the court held:

> [I]t is sufficient to note that 42 *U.S.C.* § 1983 was not intended to apply to this type of action. *See Consol. Freightways Corp. of Del. v. Kassel*, 730 *F.*2d 1139, 1145-1147 (8th Cir. 1984), *cert.* den. 469 *U.S.* 834, 105 *S.Ct.* 126, 83 *L.Ed.*2d 68 (1984); *Private Truck Council v. Secretary of State*, [505 A.2d] at 220-222; *Private Truck Council of America v. State*, [128 N.H. at 466,] 517 A.2d at 1156-57.

221 N.J. Super. at 97, 534 A.2d at 18.

Finally, in *State of Ga. v. Private Truck Council &c.*, 258 Ga. 531, 371 S.E.2d 378 (1988), the Supreme Court of Georgia held that state statutes imposing highway user taxes on vehicles registered in certain states unconstitutionally discriminated against interstate commerce. The court, however, held that the plaintiffs were not entitled to attorney fees under § 1988.

> We agree with the state that plaintiffs may not recover attorney fees under 42 USC § 1988 for the Commerce Clause violation in this case. *Consolidated Freightways Corp. of Delaware v. Kassel*, 730 F2d 1139 (8th Cir. 1984); *Private Truck Council of America, Inc. v. Secretary of State*, 503 A2d, supra; *Private Truck Council of America, Inc. v. State of New Hampshire*, 517 A2d, supra.

258 Ga. at 535, 371 S.E.2d at 381.

In addition to his commerce clause claim, the plaintiff further alleged that §§ 60-305.02 and 60-305.03 (Reissue

1984) were in violation of the privileges and immunities clause, U.S. Const. art. IV, § 2, cl. 1, which provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Section 1983 embodies individual rights cognizable under the privileges and immunities clause. *Intern. Organization of Masters, Etc. v. Andrews*, 831 F.2d 843 (9th Cir. 1987).

In his second amended petition the plaintiff alleged:

> 2. Plaintiff Mark E. Dennis owns and operates Dennis Trucking, a sole proprietorship with its principal place of business in Ohio. He is an owner of a nonresident vehicle for purposes of the taxes and fees imposed under Sections 60-305.02 and 60-305.03, which vehicle is duly authorized to operate in the State of Nebraska.
>
> . . . .
>
> 13. Plaintiff Mark E. Dennis owns one vehicle, which is registered in the State of Ohio. . . .
>
> . . . .
>
> 17. The retaliatory taxes and fees imposed pursuant to Sections 60-305.02 and 60-305.03 constitute a denial of the privileges and immunities of the plaintiff, whose vehicle is registered outside the State of Nebraska, because they are imposed based on the taxpayer's residence in another state. No comparable tax is imposed on residents of Nebraska. Accordingly, these taxes discriminate against nonresidents in violation of the Privileges and Immunities Clause of Article IV, Section 2, Clause 1 of the United States Constitution.

The trial court resolved this issue against Dennis.

In considering a statute challenged on the basis of the privileges and immunities clause, a distinction must be made based upon residence or citizenship.

The plaintiff operates one tractor and two trailers in interstate commerce. Since his tractor is registered in Ohio, he is subject to taxation under §§ 60-305.02 and 60-305.03 when he operates in Nebraska. Pursuant to a reciprocity agreement between Nebraska and Ohio, owners of vehicles which are registered in Ohio are granted full license reciprocity for interstate movement in Nebraska and pay no registration fees to Nebraska; however, when operating in Nebraska, owners of such vehicles must pay a fee of 1 to 2 cents per mile. This fee mirrors a like charge imposed by Ohio on owners of Nebraska-registered vehicles which operate in Ohio.

The purpose of the privileges and immunities clause "is to outlaw classifications based on the fact of noncitizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." *Toomer v. Witsell*, 334 U.S. 385, 398, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948). The clause "'does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States.'" *Hicklin v. Orbeck*, 437 U.S. 518, 525, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978), quoting *Toomer v. Witsell*, *supra*. "Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally." *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371, 383, 98 S. Ct. 1852, 56 L. Ed. 2d 354 (1978). "The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism." *Austin v. New Hampshire*, 420 U.S. 656, 662, 95 S. Ct. 1191, 43 L. Ed. 2d 530 (1975).

Section 60-305.02 provided:

> *Trucks, truck-tractors, semitrailers, trailers, or buses, from states other than Nebraska,* entering Nebraska shall be required to comply with all the laws and regulations of any nature imposed on Nebraska trucks . . . and to comply with all the requirements as to payment of all license fees, permit fees, and fees of whatever character which owners of trucks . . . owned and operated in Nebraska, are required to pay when operating in such foreign state, unless the state or states, *in which such trucks . . . are domiciled,* grant reciprocity comparable to that extended by the laws of Nebraska.

(Emphasis supplied.)

Section 60-305.03 provided:

> (1) In case a foreign state . . . is not reciprocal as to license fees on commercial trucks . . . the owners of such *nonresident vehicles* from those states or territories will be required to pay the same license fees as are charged residents of this state in such foreign state or territory. In case no fees are charged in Nebraska on trucks . . . other than license fees, and the reciprocity law of any other foreign state . . . does not act to exempt Nebraska trucks . . . operating in that state from payment of all fees whatsoever, the owners of such *foreign trucks* . . . shall be required to pay a fee in an amount equal to the fee of whatever character, other than license fee, is charged by such other state to foreign trucks . . . .
>
> . . . .
>
> (7) Properly registered shall mean a vehicle licensed or registered in one of the following: . . . (b) *the jurisdiction in which a commercial vehicle is registered, where the operation in which such vehicle is used has a principal place of business therein, and from or in which the vehicle is most frequently*

> *dispatched, garaged, serviced, maintained, operated, or otherwise controlled, and the vehicle is assigned to such principal place of business . . . .*

(Emphasis supplied.)

The plaintiff contends that because § 60-305.03 imposes taxes only upon " 'the owners of . . . nonresident vehicles,' " and not on residents of Nebraska, the challenged taxes and fees "clearly deny the former substantial equality of treatment with the latter." Brief for appellant at 26. The taxation imposed pursuant to §§ 60-305.02 and 60-305.03 is not related to the resident or nonresident status of the motor carrier, but is based upon the state where the particular vehicle is registered. If a citizen of Nebraska owned a vehicle registered in a state which imposed third-structure taxes on vehicles registered in Nebraska (i.e., Arkansas, Arizona, Idaho, Wyoming, New York, Pennsylvania, Oregon, Nevada, or Ohio), the Nebraska citizen would be subject to retaliatory taxation pursuant to §§ 60-305.02 and 60-305.03. In this respect, the owners of foreign-registered vehicles who are not citizens or residents of Nebraska are treated no differently from the owners of foreign-registered vehicles who are citizens of Nebraska. Since the statutes do not make a distinction based upon residence or citizenship, the statutes do not violate the privileges and immunities clause.

Furthermore, only an out-of-state citizen has standing to bring a challenge under the privileges and immunities clause. See *Bradwell v. The State*, 83 U.S. (16 Wall.) 130 (1872); *White v. Thomas*, 660 F.2d 680 (5th Cir. 1981), *cert. denied*, 455 U.S. 1027, 102 S. Ct. 1731, 72 L. Ed 2d 148 (1982). The second amended petition does not allege that the plaintiff is a citizen of another state, only that he owns and operates Dennis Trucking, a sole proprietorship with its principal place of business in Ohio, that his truck is registered in Ohio, and that he

is subject to taxation because his truck is registered in Ohio.

The case was tried on a stipulated record consisting of two exhibits: a stipulation of facts and the affidavit of the Lancaster County assessor. There was no proof that the plaintiff is a citizen of another state.

There was no error in dismissing the plaintiff's claim based on a violation of the privileges and immunities clause. The statutes do not discriminate on the basis of citizenship or residency, and there was no proof that the plaintiff was a citizen of another state and had standing to pursue a claim under the privileges and immunities clause.

By the cross-appeal the defendants contend that the trial court erred in finding that the plaintiff and his attorneys were entitled to payment of their expenses and reasonable fees under the equitable fund doctrine. This finding was in error for several reasons.

A statement of the common fund doctrine is found in *Summerville v. North Platte Valley Weather Control Dist.*, 171 Neb. 695, 696-97, 107 N.W.2d 425, 427 (1961):

> [W]here one has gone into a court of equity and, taking the risk of litigation on himself, has created or preserved or protected a fund in which others are entitled to share, such others will be required to contribute their share to the reasonable costs and expenses of the litigation, including reasonable fees to the litigant's counsel.

The doctrine presupposes the existence of a fund. As the court in *Crane Towing v. Gorton*, 89 Wash. 2d 161, 176-77, 570 P.2d 428, 437 (1977), said: "As the name implies, the 'common fund' doctrine requires the prevailing party to have brought suit to preserve or protect a fund which benefits the party and others."

There is no fund in this case, much less a fund within the jurisdiction of the trial court.

> The common fund must be an immediate fund from which attorney's fees may be awarded at trial. *Seattle Sch. Dist. 1 v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978). The effect of this litigation may well benefit other nursing homes in the state. However, it did not create a presently existing common fund at trial from which reasonable attorney's fees could be awarded.

United Nursing Homes v. McNutt, 35 Wash. App. 632, 643, 669 P.2d 476, 483 (1983).

In *Hoffman v. Lehnhausen*, 48 Ill. 2d 323, 329, 269 N.E.2d 465, 469 (1971), the Supreme Court of Illinois said:

> Several considerations set this case apart from the usual situation in which attorneys fees are allowed from a fund brought into court by one who sues as a member of a class. No fund was involved in this case. The attorneys for the plaintiffs say that this circumstance is irrelevant, because the trial judge refused to enter an order which would have created such a fund. Again we think, however, that the ruling of the trial court was correct. We are aware of no authority under which the process of tax collection and distribution could have been interrupted to divert from the governmental bodies that had levied the taxes an amount fixed by the court as fees for the attorneys for the plaintiffs.

In *Lebanks v. Spears*, 417 F. Supp. 169, 174 (E.D. La. 1976), the court said:

> *Mills* [*v. Electric-Auto Lite*, 396 U.S. 375, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970),] and *Hall* [*v. Cole*, 412 U.S. 1, 93 S. Ct. 1943, 36 L. Ed. 2d 702 (1973)], and the discussion of the common fund theory in

> *Alyeska* [*Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975)], require for an award of attorneys' fees under the common benefit rationale (1) an ascertainable class of beneficiaries, easily identifiable, and (2) a source of funds common to the class from which the award can be made. Public interest litigation generally cannot meet these requirements. Actions to vindicate constitutional rights which benefit the public usually can present only the "private attorney general" theory for the award of attorneys' fees. Prevailing parties in public interest litigation ought not to be permitted, by emphasizing the importance of enforcing constitutional rights, to attach the "common benefit" label to what is really the "private attorney general" theory, and ultimately to merge the two theories.

In *Hamer v. Kirk*, 64 Ill. 2d 434, 442, 356 N.E.2d 524, 528 (1976), the court said: "[I]n the absence of a fund, a plaintiff's attorney is not entitled to attorney's fees merely because he has conferred a benefit upon members of a class." The court held that because no fund had been created, nor did the court have the authority to create a fund, the substantial benefit theory did not apply to the facts presented. The court further held that no statutory authority existed on which to base an award of attorney fees under the private attorney general theory. The order of the trial court denying an award of attorney fees to the plaintiffs was affirmed.

In *Hamer v. Kirk, supra*, the Supreme Court of Illinois held attorney fees could not be awarded under the common fund doctrine where there was no fund within the control of the court. The Supreme Court reviewed its prior decisions in *Rosemont Bldg. Sup. v. Highway T. Auth.*, 51 Ill. 2d 126, 281 N.E.2d 338 (1972), and *The People v. Holten*, 304 Ill. 394, 136 N.E. 738 (1922), in which the court recognized that if a fund is to serve as

a source of attorney fees, said fund must be under the control of the court. In *Hamer, supra* at 441, 356 N.E.2d at 527, the court concluded that "[s]ince no fund had been placed under control of the court in the instant case, the trial court was without authority to award attorney's fees to the petitioner." See also, *Van Emmerik v. Montana Dakota Utilities Co.*, 332 N.W.2d 279 (S.D. 1983), *cert. denied* 464 U.S. 915, 104 S. Ct. 278, 78 L. Ed. 2d 257; *Eckford v. Borough of Atlanta*, 173 Ga. 650, 160 S.E. 773 (1931); *Fitzgerald v. City of Philadelphia*, 87 Pa. Commw. 482, 487 A.2d 485 (1985); *Von Holt v. Izumo Taisha Mission*, 44 Haw. 147, 355 P.2d 40 (1960), *aff'd on rehearing* 44 Haw. 365, 355 P.2d 44; *Satoskar v. Indiana Real Estate Commission*, 517 F.2d 696 (7th Cir. 1975), *cert. denied* 423 U.S. 928, 96 S. Ct. 276, 46 L. Ed. 2d 256 (1975); *Townsend v. Edelman*, 518 F.2d 116 (7th Cir. 1975).

In *Private Truck Council of America v. State*, 128 N.H. 466, 477, 517 A.2d 1150, 1157 (1986), a suit nearly identical to the case at bar, the Supreme Court of New Hampshire found that the plaintiffs had "not demonstrated a common law right to attorney's fees under the theory of a 'common fund' for the benefit of a class because, as we have indicated, this action has not been properly certified as a class action."

Each person who may be entitled to a refund must individually file a separate claim for a refund. Each such claim may be denied for a variety of reasons. The merits of each claim for a refund must be determined on a case-by-case basis. There is no evidence that anyone, including the plaintiff, has filed a claim and is entitled to a tax refund.

The plaintiff argues that the trial court should have found that the common fund consisted of the total amount of taxes subject to refund. Not only was there no evidence of what that amount might be, the trial court had

no jurisdiction of other persons who may have paid the invalid taxes or any way of knowing whether such amounts would be subject to a refund if claims were made.

There was no basis upon which an award of attorney fees could have been made against the State of Nebraska because the State has not waived its sovereign immunity as to attorney fees under circumstances such as this case. See, Neb. Const. art. V, § 22; *Gentry v. State*, 174 Neb. 515, 118 N.W.2d 643 (1962).

The judgment of the district court is affirmed, except as to that part which provides: "The plaintiff and his attorneys are entitled under the Equitable Fund Doctrine to payment of their expenses and reasonable fees." That part of the judgment is reversed.

AFFIRMED IN PART,
AND IN PART REVERSED.

FAHRNBRUCH, J., not participating.

APPENDIX B

IN THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

Docket 390 Page 26

MARK E. DENNIS, d/b/a Dennis Trucking,
Plaintiff,

vs.

STATE OF NEBRASKA, *et al.*,
Defendants.

ORDER

This matter came before the Court on June 3, 1987, for trial on the plaintiff's second amended petition. The plaintiff appeared by his attorneys, Richard A. Allen and Richard L. Spangler, Jr. The defendants appeared by their attorneys, Special Assistant Attorney General Ruth Anne Evans and Assistant Attorney General Jill Gradwohl Schroeder. Trial was held upon stipulation of facts received in evidence as Exhibit No. 1 and Exhibit No. 2, the affidavit of County Assessor Robert McGee, which set forth the various valuations used by the Lancaster County Assessor for the purpose of assessing ad valorem taxes on various models of 1979 truck-tractors. Exhibit No. 2 was received in evidence over the objections of the plaintiff. The matter was then argued and submitted to the Court on briefs. The Court being fully advised, now finds and orders as follows:

1. This is an action for a declaratory judgment to declare retaliatory taxes imposed by Nebraska Revised Statute §§ 60-305.02 and 60-305.03 unconstitutional, and

to enjoin the defendants from enforcing and collecting the tax.

2. The Court adopts as its findings of fact the stipulations of facts received in evidence as Exhibit No. 1 and the affidavit setting forth valuations of various models of 1979 truck-tractors received in evidence as Exhibit No. 2.

3. The plaintiff is entitled to judgment on Count I of his second amended petition declaring that the retaliatory taxes and fees imposed on plaintiff pursuant to §§ 60-305.02 and 60-305-03, Revised Statutes of Nebraska, are unconstitutional in that they constitute an unlawful burden on interstate commerce in violation of the Commerce Clause of Article I, Section 8, Clause 3 of the United States Constitution because they are imposed only on motor carriers whose vehicles are registered outside the State of Nebraska, while no comparable tax or fee is imposed on carriers whose vehicles are registered in the State of Nebraska. On their face said taxes and fees discriminate against interstate commerce.

4. The plaintiff has failed to sustain his burden of proving that he is entitled to judgment on Count II, denial of privileges and immunities, Count II, violation of Article III, Section 18 of the Constitution of the State of Nebraska, and Count IV, violation of 42 U.S.C. § 1983.

5. The plaintiff and his attorneys are entitled under the Equitable Fund Doctrine to payment of their expenses and reasonable fees. The Court shall determine the amount of any such expenses and fees by subsequent order following the submission of documentation regarding the fund from which said expenses and fees may be paid.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the retaliatory taxes and fees imposed on plaintiff pursuant to §§ 60-305.02 and 60-305.03, Revised Statutes of Nebraska, are unconstitutional in that they constitute an unlawful burden on interstate commerce in violation of the Commerce Clause of Article I, Section 8,

Clause 3 of the United States Constitution. The defendants are permanently enjoined from assessing, levying or collecting taxes or fees pursuant to said statutes.

The plaintiff has failed to sustain his burden of proving that he is entitled to judgment on Counts II, III and IV of the second amended petition and said Counts II, III and IV should be and they are hereby dismissed. Costs of this action are taxed to the defendants in their official capacities.

The plaintiff and his attorneys are entitled under the Equitable Fund Doctrine to payment of their expenses and reasonable fees. The Court shall determine the amount of any such expenses and fees by subsequent order following the submission of documentation in support thereof and a showing regarding any fund available for payment of said fees and expenses.

The Court now having found that the retaliatory taxes and fees imposed pursuant to §§ 60-305.02 and 60-305.03, Revised Statutes of Nebraska, are unconstitutional. The Court now pursuant to its order of June 17, 1985, finds that today's order shall be applicable to all persons affected thereby. Each person affected will be required to submit a claim to the Department of Administrative Services as provided in § 77-2406, Revised Statutes of Nebraska. In addition, each of the persons requesting a refund will be required to show proof of the date of payment, the amount paid, whether or not such payments were voluntary, and shall be required to provide such other information and proof as deemed necessary by the Department of Administrative Services.

DATED AND SIGNED this 30th day of September, 1987.

BY THE COURT:

/s/ Bernard J. McGinn
BERNARD J. MCGINN
District Judge

APPENDIX C

IN THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

Docket 390 Page 26

PRIVATE TRUCK COUNCIL OF AMERICAN, INC., and DENNIS TRUCKING, on behalf of themselves and others similarly situated, *Plaintiffs*,

v.

STATE OF NEBRASKA; HOLLY JENSEN, Director, Nebraska Department of Motor Vehicles; LOU LAMBERTY, Director, Nebraska Department of Roads; KAY ORR, Nebraska State Treasurer,

Defendants.

ORDER

The instant cause of action was commenced on December 17, 1984, by the filing of a Petition in the District Court of Douglas County, Nebraska. Plaintiffs also filed a Motion for Preliminary Injunction or in the Alternative to Require Placement of Tax Collections in Escrow together with the Affidavit of Janis Dennis on December 27, 1984.

The defendants, pursuant to Neb.Rev.Stat. § 24-324 (Reissue 1979), filed a Motion for Change of Venue together with a Motion for Continuance of the hearing on plaintiff's Motion for Preliminary Injunction. Each individual defendant also filed separate Demurrers to the Petition of the plaintiffs. All of the foregoing Motions were set for hearing on January 21, 1985, before the Honorable John E. Clark, District Court Judge.

On January 21, 1985, the plaintiffs appeared by and through their counsel, John F. Thomas and Jacob P. Billig. Defendants appeared by and through their counsel, Ruth Anne E. Galter and Jill Gradwohl, Assistant Attorneys General for the State of Nebraska. Arguments were heard on defendants' Motion for Change of Venue and Motion for Continuance of the hearing for Preliminary Injunction. Defendants' motions were sustained, per J. Clark, and the cause of action was properly transferred to the District Court of Lancaster County, Nebraska, on January 22, 1985. The record reflects that the same was entered at Docket 390, Page 26 of the Lancaster County District Court on January 25, 1985.

In this court, plaintiffs then filed a Motion to Certify the Class and a Motion for Summary Judgment. The defendants filed a Motion to Strike the plaintiffs' Motion for Summary Judgment. A hearing was held on March 18, 1985, before the Honorable Dale E. Fahrnbruch, District Court Judge. Plaintiffs appeared by and through their counsel, Richard L. Spangler, Jr. Defendants appeared by and through their counsel Ruth Anne E. Galter. The Motion to Strike was argued, submitted, and sustained for the reason that no issues had been framed since defendants had not yet answered plaintiff's Petition. Therefore, the filing of a Motion for Summary Judgment by plaintiffs was premature.

Thereafter, on March 22, 1985, with all counsel present, a hearing was held on plaintiffs' Motion for Preliminary Injunction or in the Alternative to Require Placement of Tax Collections in Escrow, on plaintiffs' Motion to Certify the Class, and on the Demurrers of defendants, and each of them. Evidence was adduced, all matters were argued, and the parties submitted briefs in support of their respective positions.

The Court, now being fully advised in the premises, finds from the pleadings that, although the plaintiffs refer in paragraph 10 of their Petition to a "fuel tax on the

consumption of motor fuel within the State," the cause of action is, in fact, related only to what plaintiffs have alleged to be "retaliatory taxes" imposed pursuant to Neb.Rev.Stat. §§ 60-305.02 and 60-305.03 (Reissue 1984).

The Court finds from the pleadings, files, and arguments of counsel, that plaintiff Private Truck Council of America, Inc. has no legal standing in this lawsuit and therefore no standing to be a party plaintiff and is not the real party in interest. The Court further finds that Dennis Trucking, according to the pleadings, is an unincorporated motor carrier and as such is not a legal entity. Therefore Dennis Trucking has no legal capacity to bring this action. It is apparent from the briefs of plaintiffs and the Affidavit filed in support of the Motion for Preliminary Injunction that Dennis Trucking is operated by one or more individuals, doing business as Dennis Trucking. However, the Court finds that designating a plaintiff as Dennis Trucking does not place before this Court the individuals owning and/or operating that business. Therefore, in the event of taxing of costs, the Court cannot assess costs against Dennis Trucking.

The Court finds that pursuant to Article VIII, Section 9, of the Constitution of the State of Nebraska that "[t]he Legislature shall provide by law that all claims upon the treasury shall be examined and adjusted as the Legislature may provide before any warrant for the amount allowed shall be drawn." The Court finds that the Legislature has provided that "all claims of whatever nature upon the treasury of this state, before any warrant shall be drawn for the payment of the same, shall be examined, adjusted and approved by the Department of Administrative Services. No warrants shall be drawn for any claim until an appropriation shall have been made therefore." Neb.Rev.Stat. § 77-2406 (Reissue 1981).

The Legislature has further provided the method by which plaintiffs may attack the validity of the imposition of a tax:

> If a person who claims a tax or any part thereof to be invalid for any reason other than the valuation of the property shall have paid the same to the treasurer or other proper authority in all respects as though the same was legal and valid, he or she may, at any time within thirty days after such payment, demand the same in writing from the county treasurer to whom paid. If the same shall not be refunded within ninety days thereafter, he or she may sue such county treasurer for the amount so demanded. Upon the trial, if it shall be determined that such tax or any part thereof was for any reason invalid, judgment shall be rendered therefor with interest and such judgment shall be collected as in other cases. . . .

Neb.Rev.Stat. § 77-1735 (Supp. 1984).

The Court finds that it cannot, in a proceeding such as this, order a refund of taxes, nor does this Court have the authority to order the same to be placed in escrow at interest. Therefore, the plaintiffs' Motion for Preliminary Injunction or in the Alternative to Require Placement of Tax Collections in Escrow should be denied. The Court is not finding that it cannot enjoin the collection of taxes should the Court find the operational law unconstitutional.

The Court finds that the Motion to Certify the Class should also be denied for the reason that the instant cause of action is not a proper class action. If the Court determines the law to be unconstitutional, that determination will be applicable to all persons affected thereby. In the event of such a determination, each person affected will be required to submit a claim to the Department of Administrative Services as provided in Neb.Rev.Stat. § 77-2406. In addition, each of the persons requesting a refund would be required to show proof of the date of payment, the amount paid, whether or not such payments were made voluntarily, and would be required to provide such

other information and proof as deemed necessary by the Department of Administrative Services. The resolution of such claims must be determined on a case by case basis depending upon the individual proof submitted in support of each claim. Consequently, class resolution of such claims is inappropriate and improper.

The Court finds that the Demurrers of the Defendants, and each of them, should be sustained for the reason that there are no proper plaintiffs before this Court with standing or legal capacity to bring the instant cause of action.

IT IS THEREFORE ORDERED THAT plaintiffs' Motion for Preliminary Injunction or in the Alternative to Require Placement of Tax Collections in Escrow and plaintiffs' Motion to Certify the Class should be and the same hereby are, overruled and denied; that the Demurrers of the Defendants, and each of them, should be, and the same hereby are, sustained; that plaintiffs shall have 30 days from the date of this order to file an amended petition; and that if an amended petition is not filed within 30 days, the case shall stand dismissed with all costs taxed to Private Truck Council of America, Inc.

IT IS SO ORDERED.

Dated this 17th day of June, 1985.

BY THE COURT:

/s/ Dale E. Fahrnbruch
District Court Judge

APPENDIX D

Neb. Rev. Stat. § 60-305-02 (Reissue 1984) provided:

> 60-305.02. Nonresident owners; trucks and buses; registration; reciprocity. Trucks, truck-tractors, semitrailers, or buses, from states other than Nebraska shall be required to comply with all the laws and regulations of any nature imposed on Nebraska trucks, truck-tractors, semitrailers, trailers, or buses, and to comply with all the requirements as to payment of all license fees, permit fees, and fees of whatever character which owners of trucks, truck-tractors, semitrailers, trailers, or buses, owned and operated in Nebraska, are required to pay when operating in such foreign state, unless the state or states, in which such trucks, truck-tractors, semitrailers, trailers, or buses are domiciled, grant reciprocity comparable to that extended by the laws of Nebraska.

Neb. Rev. Stat. § 60-305.03 provided in pertinent part:

> 60-305.03. Nonresident owners; trucks and buses; where no reciprocity; fees; all vehicles, reciprocal agreements authorized; terms and conditions; revision; absence of agreement; effect. (1) In case a foreign state or territory is not reciprocal as to license fees on commercial trucks, truck-tractors, semitrailers, trailers, or buses, the owners of such nonresident vehicles from those states or territories will be required to pay the same license fees as are charged residents of this state in such foreign state or territory. In case no fees are charged in Nebraska on trucks, truck-tractors, semitrailers, trailers, or buses, other than license fees, and the reciprocity law of any other foreign state or territory does not act to exempt Nebraska trucks, truck-tractors, semitrailers, trailers or buses operating in that state

> from payment of all fees whatsoever, the owners of such foreign trucks, truck-tractors, semitrailers, or buses shall be required to pay a fee in an amount equal to the fee of whatever character, other than license fee, is charged by such other state to foreign trucks, truck-tractors, semitrailers, trailers, or buses: *Provided*, that the owners of all foreign trucks, truck-tractors, semitrailers, trailers, or buses, doing intrastate hauling in this state, shall be required to pay the same registration fees as those required to be paid by residents of this state, unless such vehicles are registered as a part of a fleet in interstate commerce, as provided in section 60-305.09. In no case shall the fee charged to an owner of a foreign motor vehicle exceed the total fees required to be paid on like vehicles by residents of the state. The Department of Roads shall act as an agent for the Department of Motor Vehicles in collecting such fees and shall remit all such fees collected to the State Treasurer, who shall place such money in the Highway Cash Fund.